

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No.: 14-16

BALTIC AUTO SHIPPING, INC.,

Complainant,

— vs. —

**MICHAEL HITRINOV
a/k/a MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC.,**

Respondents.

COMPLAINANT’S MOTION FOR LEAVE TO AMEND ITS COMPLAINT

Pursuant to Rules 66, 69, and 71 of the Federal Maritime Commission’s (the “Commission”) Rules of Practice and Procedure (46 C.F.R. 502 *et seq.*), Complainant, through its Counsel, Marcus A. Nussbaum, Esq. respectfully submits this brief in support of its motion seeking leave of the Commission to amend the complaint in the instant matter. For the sake of judicial economy, Complainant is seeking leave to amend the Complaint in lieu of filing a new action before the Commission regarding the retaliatory acts described below, and which are related to the current proceeding.

As the Commission may recall, I am the attorney for the Complainant in the above captioned matter. The basis for complainant’s request for leave to amend is so that complainant may add additional parties and additional allegations to the complaint regarding events that have occurred subsequent to start of this action. In sum, subsequent to complainant having filed the instant action before the Commission, the respondents retaliated against complainant by filing frivolous lawsuits in two separate Federal Courts, as well as multiple frivolous motions, the sole

purpose of which was to harass, injure, and annoy the complainant, and to cause complainant to incur legal fees.

Most alarmingly, counsel representing the respondents in the Federal Actions (and who has not appeared before the Commission) went so far as to demand that complainant withdraw its complaint here, or face a motion for sanctions in Federal Court pursuant to Federal Rule of Civil Procedure Rule 11. Counsel has followed up on that threat and a motion for sanctions is now being briefed before the Court.

The acts that are described in detail below are taken from the proposed amended complaint (annexed hereto as **Exhibit “A”**) and the accompanying affirmation, and which form the basis for complainant’s new allegation that the respondents have violated the Shipping Act of 1984, 46 U.S.C. §41104(3) by retaliating against the Complainant because the Complainant has filed a complaint with the Commission.

1. On November 28, 2014, the undersigned filed the instant action on behalf of complainant before the Federal Maritime Commission (“FMC”) in Washington, D.C., alleging that respondent EMPIRE UNITED LINES CO., INC. (“EUL”) and its principal, Michael Hitrinov, had violated the Shipping Act of 1984 (the “Shipping Act”).

2. Subsequent thereto, on December 8, 2014, the undersigned was contacted via email by Mr. Gerard Doyle, Esq., who is counsel for EUL and Hitrinov in this proceeding. In that email, Mr. Doyle claimed that a \$200,000.00 loan made to defendants by EUL in 2010 was unpaid. The documents annexed to that email contained a document entitled “Loan Agreement” allegedly describing complainant’s agreement to accept a loan from respondents for one month at an interest rate of 1% per month. Notably, the respondents’ allegations regarding an unpaid loan had no relationship whatsoever with the proceeding ongoing before the FMC, and counsel was advised of that fact, by email on December 14, 2014.

3. The December 14, 2014 email also advised Mr. Doyle and Mr. Werner that the loan had been paid off with interest.

4. In addition, on December 12, 2014, the undersigned was contacted by Mr. Jon Werner, Esq. who represented respondents in the 2011 District of New Jersey Action involving the parties herein that settled on or about November 29, 2011. Strangely enough, Mr. Werner began making various inquiries to the undersigned regarding the proceedings ongoing before the FMC.

5. On December 14, 2014, the undersigned responded to Mr. Werner's inquiry and respectfully explained to him that he had not formally appeared before the Federal Maritime Commission ("FMC") with respect to this matter, and that the undersigned was not at liberty to discuss the details of this proceeding with him.

6. On December 28, 2014, the undersigned advised Mr. Doyle by email to refrain from further including Mr. Werner in the parties' communications regarding the FMC matter, due to the fact that Mr. Werner had nothing to do with the FMC matter and had not formally made an appearance before the FMC on behalf of EUL and Hitrinov. In that email, the undersigned also requested that Mr. Doyle refrain from copying Mr. Hitrinov on his communications to the undersigned, and also attached a second letter for Mr. Werner, that Mr. Doyle was free to forward to Mr. Werner if he chose to do so. In that letter, out of professional courtesy, the undersigned again requested of Mr. Werner that going forward, he send all additional questions regarding this matter to the attorneys currently representing Empire and Mr. Hitrinov before the FMC.

7. On December 29, 2014, EUL and Hitrinov, by their counsel Mr. Werner, filed an emergency motion for an anti-suit injunction in the matter of *Baltic Auto Shipping, Inc. v. Hitrinov et al.* (U.S.D.C. – D.N.J. Docket No. 2:11-cv-06908-FSH-PS), seeking to restrain

defendants from proceeding forward with their claims before the FMC. That motion was denied by the Court on January 16, 2015 in an Order by Hon. Faith S. Hochberg.

8. Prior to the denial of the motion for the anti-suit injunction, on January 5, 2015, Mr. Werner, in retaliation for defendants having started the FMC action, threatened the undersigned and the defendants with sanctions unless the undersigned agreed to withdraw the claims before the FMC, specifically stating that: “We demand that you dismiss with prejudice your claims against Empire United Lines Co., Inc. and Michael Hitrinov before the Federal Maritime Commission within 21 days of the date of this letter...”

9. On January 12, 2015, in blatant disregard of the undersigned’s request to exclude Mr. Werner from communications regarding proceedings between counsel in the FMC matter, Mr. Doyle once again emailed the undersigned and copied Mr. Werner and Hitrinov by email with a request for confirmation that the loan had been repaid. In light of the undersigned previously having advised Mr. Doyle: (1) to refrain from further including Mr. Werner in the parties’ communications regarding the FMC matter; and (2) that the loan had already been repaid, the undersigned ignored that request. In addition, Mr. Doyle again ignored the undersigned’s request to cease copying Mr. Hitrinov on his communications directly to the undersigned.

10. On January 20, 2015, EUL and Hitrinov filed a new action in the U.S. District Court for the District of New Jersey, captioned as *Empire United Lines Co., Inc. et al. v. Baltic Auto Shipping, Inc.* (U.S.D.C. – D.N.J. Docket No. 2:15-cv-00355-CCC-MF), along with a new motion for an anti-suit injunction. That motion was denied by Hon. Claire C. Cecchi on January 23, 2015.

11. The complaint in this new District of New Jersey matter alleges that complainant breached a settlement agreement containing a mutual release, and therefore waived its rights to bring an action against respondents before the FMC.

12. On January 22, 2015, EUL and Hitrinov once again filed a motion for a stay of the proceedings before the FMC, and that motion was denied by the Administrative Law Judge presiding over the FMC matter in an order dated February 2, 2015.

13. Once again, in retaliation for the complainant starting a proceeding before the FMC, on February 4, 2015, EUL and Hitrinov, by their counsel Mr. Werner, filed the second matter in the U.S. District Court for the Eastern District of New York (Captioned as *Empire United Lines Co., Inc. v. Presniakovas et al.* U.S.D.C. – E. D.N.Y., 1:15-cv-00557-DLI-RER), alleging that the complainant had failed to repay a loan in the amount of \$200,000.00.

14. In that Eastern District of New York matter, subsequent to complainant herein having filed its answer and counterclaim, in retaliation for complainant having started the FMC action, on or about March 19, 2015, Mr. Werner filed a frivolous motion to strike complainant's counterclaim and affirmative defenses. That motion was filed by respondents and their counsel for the sole purpose of harassing, injuring, and annoying the complainant, and to cause complainant to incur legal fees.

15. In that motion, Mr. Werner incorrectly relied upon the adoption of a heightened pleading standard for affirmative defenses rather than the applicable standard of law in the Eastern District of New York.

16. Once again, on March 18, 2015, Mr. Werner, in retaliation for defendants having started the FMC action, threatened the undersigned personally and the complainant with sanctions unless the undersigned agreed to withdraw the claims before the FMC, specifically stating that: "We demand that you dismiss with prejudice your claims against Empire United

Lines Co., Inc. and Michael Hitrinov before the Federal Maritime Commission within 21 days of the date of this letter, and withdraw the Answer filed with this Court on February 25, 2015. If you refuse to dismiss your claims against Empire United Lines Co., Inc. and Michael Hitrinov and withdraw the Answer, then we will be forced to file the attached Motion for Sanctions with the Court.”

17. On March 25, 2015 an initial conference was held before Magistrate Judge Reyes in the Eastern District of New York matter, during which the Court noted that it was interesting how the respondents could have failed to realize that a loan in the amount of \$200,000.00 had not been repaid since 2010. Interestingly enough, during the conference, Mr. Werner also made reference to the FMC matter, when the Eastern District of New York matter has no connection to the FMC matter.

18. Subsequent thereto, on April 16, 2015, Mr. Werner admitted that his client had indeed received a wire transfer in the amount of \$202,000.00 on December 9, 2010 with the notation: “return of the loan”. Notably, respondents were advised of that fact on December 14, 2014.

19. On April 8, 2015, respondents, by their counsel Mr. Werner, in retaliation for defendants having started the FMC action, filed the motion against complainant and its counsel in the new District of New Jersey matter, in which respondents seek an order granting them sanctions under Federal Rule of Civil Procedure Rule 11.

20. That motion was filed by respondents and their counsel for the sole purpose of harassing, injuring, and annoying the complainant, and to cause complainant to incur legal fees.

21. In that motion, Mr. Werner’s legal arguments fail to meet the standard for warranting relief pursuant to FRCP Rule 11, as they are premised entirely on a factual dispute.

22. In that motion, Mr. Werner improperly attempts to use the motion as a discovery device and to test the legal sufficiency or efficacy of allegations in the pleadings.

23. In that motion, Mr. Werner incorrectly argued to the Court that the continuing violation doctrine is not applicable to causes of action for reparations under the Shipping Act, and that the doctrine is limited solely to the Commission's own enforcement proceedings.

24. Mr. Werner's legal arguments stand in stark and marked contrast to the FMC's binding precedent in the matter of Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth., 18 S.R.R. 1079 (ALJ 1979).

25. In that motion, Mr. Werner incorrectly argued to the Court that complainant's claim for "storage/demurrage charges and lost contracts...have nothing to do with any of the claims asserted in the FMC matter.."

26. Mr. Werner's arguments stand in stark and marked contrast to the allegations by complainant herein, in which complainant alleges that it is "seeking reparations for injuries caused to it by EUL and Hitrinov as a result of their violation of 46 U.S.C. §§ 41102, 41104, 40501 and the FMC's regulations at 46 C.F.R. Part 515, by: (1) failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property...." and that "During the time period alleged herein, EUL accepted money from the Complainant for the shipment of various shipping containers, then subsequently refused to release these containers."

27. In that motion, Mr. Werner incorrectly argued to the Court that ""if there had been any breach of the settlement agreement by EUL, Baltic's recourse would have been to re-open the case in this Court to make an application for enforcement of the settlement agreement..."

28. Mr. Werner's legal arguments stand in stark and marked contrast to the well-established rule that the FMC has exclusive jurisdiction to adjudicate violations of the Shipping Act of 1984.

29. Subsequent thereto, on or about April 13, 2015, Magistrate Judge Falk, who is overseeing the case in the new District of New Jersey matter, held a telephonic conference, where he asked respondents' counsel why the motion for sanctions was filed prior to discovery having been conducted, and further noted that respondents' counsel did not follow proper procedure in doing so.

30. By virtue of the foregoing, Mr. Werner and his law firm have retaliated against the complainant for filing a complaint with the FMC.

31. Mr. Werner was advised orally and in writing numerous times that his acts were retaliatory, yet he persisted in his unlawful activity.

32. Mr. Werner's retaliatory acts include a coordinated campaign of filing frivolous motions, including two separate motions for a stay of the instant proceeding (both of which were filed in the District of New Jersey matters, all of which were denied), a frivolous motion to strike complainant's answer and counterclaim in the Eastern District of New York matter, two separate threats of sanctions against the undersigned personally and complainant, and the actual filing of the motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure in the new District of New Jersey matter.

33. All of the foregoing motions were filed for the sole purpose of retaliating against the Complainant, to discourage the undersigned and the Complainant from proceeding forward in the instant matter, and to unnecessarily cause complainant to incur legal fees. As the Commission may be aware, the acts described above constitute retaliation squarely within the meaning of the Commission's well-established precedent that discusses the prohibition against

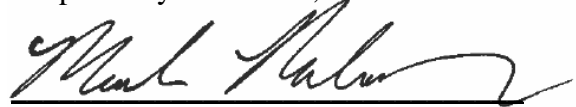
retaliation. *See, e.g., North River Insurance Co. v Federal Commerce and Navigation Co*, 20 S.R.R. 1078, 1082 (ALJ, 1981) (citing *Federal Maritime Board v. Isbrandtsen*, 356 US 481 (1958)). *See, also, Pacific American Fisheries Inc. v. American Hawaiian S.S. Co*, 2 U.S.M.C. 270, 277 (1940). As the Commission may be aware, the provision against retaliation continues to be used from time to time, as recently as 2014. *See, e.g., Complaint in Docket 14-14, Mark Barr v. Ocean Trade Lines Inc.*, at paragraph 71.

CONCLUSION

Accordingly, for the reasons set forth above, complainant requests that the instant motion be granted in its entirety.

Dated: April 27, 2015
Brooklyn, NY

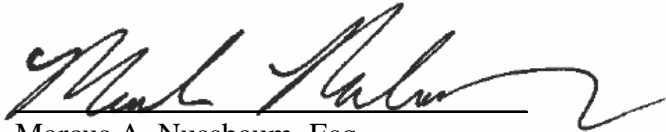
Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Marcus A. Nussbaum', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANT'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT** upon Respondents' Counsel, The Law Office of Doyle & Doyle, with the address of 636 Morris Turnpike, Short Hills, NJ 07078 by first class mail, postage prepaid, and by email (gdoyle@doyelaw.net).

A handwritten signature in black ink, appearing to read "Marcus A. Nussbaum", written over a horizontal line.

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Dated: April 27, 2015 in Brooklyn, New York.